80-904

No.

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

DOROTHY MAE HALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Whether the exclusionary rule compels suppression of evidence seized under a search warrant because a state magistrate has mistakenly concluded that the supporting affidavit furnished probable cause.

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DOROTHY MAE HALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

The Petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, Division Three, entered on August 22, 1980. The California Supreme Court denied the People's petition for hearing on October 15, 1980.

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Three, appears as Appendix A to this petition.

JURISDICTION

The judgment of the California Court of Appeal became final as to that court on September 21, 1980. The California Supreme Court denied the People's petition for hearing on October 15, 1980. (See Appendix B.) This petition for writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED UNITED STATES CONSTITUTION, AMENDMENT IV:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

A. Procedural History

By Information No. MCR 3513, filed in the Monterey County Superior Court on April 10, 1980, the District Attorney accused respondent Dorothy Mae Hall of possession of heroin for sale, in violation of California Health and Safety Code section 11351. Respondent Hall pleaded not guilty to the charge on April 23, 1980.

On April 30, 1980, Hall moved pursuant to California Penal Code section 1538.5 to quash a search warrant for her person and to suppress balloons of heroin seized from her by a police matron executing the warrant. On May 15, 1980, after a hearing, Hall's suppression motion was denied.

Hall then petitioned the California Court of Appeal, First Appellate District, for a writ of mandate setting aside the trial court's adverse order. On August 22, 1980, the California Court of Appeal, First Appellate District, Division Three, filed its opinion "directing the Monterey County Superior Court to vacate its order of May 15, 1980 denying petitioner's motion to suppress and to enter an order suppressing all evidence seized as a result of execution of the invalid search warrant." Appendix A-3. The sole basis for this ruling was the conclusion of the Court of Appeal that the magistrate had issued the warrant based upon a police affidavit which failed to satisfy the standard set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). Appendix A-2.

The People's petition for hearing in the California Supreme Court was denied on October 15, 1980. Appendix B.

B. Statement of Facts

On March 5, 1980, Seaside Police Department Detective John Zimmerman presented to a judge of the Municipal Court for the Monterey Peninsula Judicial District his sworn affidavit containing the following averments:

> "Your affiant is a detective with the Seaside Police Department and has been a police officer for the past 6½ years, specializing in narcotics investigations for the past 2½ years. As such I have developed familiarity with local customs regarding the manner of processing, packaging, and preparing heroin for sale.
>
> "This date, 3-5-80 at approximately 9:30 A.M. I was contacted by a confidential informant, known to me from numerous past transactions to be a consistent

supplier of reliable information to myself as well as other police officers. The CI informed me that DOROTHY HALL, who is known to me as a persistent heroin dealer in the local area, is selling heroin on a daily basis from her place of employment at the Noche Buena School in Seaside, that she habitually stores the heroin which she has packaged for sale inside her bra, and further that she is presently in possession of heroin which will be available for sale in the above described location today, 3-5-80. CI stated that he last purchased heroin from HALL on Monday, 3-3-80, at Noche Buena School, and that HALL obtained the heroin she sold him from a plastic bag inside her bra. CI advised me that arrangements had been made whereby he, among others, will be able to purchase heroin directly from HALL today."

Based upon this affidavit, the magistrate issued a warrant authorizing the search of Dorothy Hall's person, accomplished on March 6, 1980, at the Seaside police station by matron Betty Farmer (PHT 11-12, 20-21). This search disclosed 48 balloons of heroin and currency (PHT 21, 14-15, 18-19).

Hall challenged the warrant affidavit at her preliminary examination; the magistrate (who did not issue the warrant) held the affidavit sufficient (PHT 33). Respondent next attacked the adequacy of the affidavit in the Monterey County Superior Court; the trial judge rejected her claim (RTS 4). Finally, Hall prevailed in the California Court of Appeal.

REASONS FOR GRANTING WRIT

The bulwark of the Fourth Amendment is the Warrant Clause. Accordingly, "'The entire thrust of the exclusionary rule and the cases which have applied it is to encourage the use of search warrants by law enforcement officials.'" *People v. Moore,* 31 Cal.App.3d 919, 927, 107 Cal.Rptr. 590, 595 (1973). Consistently, then, "The rule excluding evidence obtained by unconstitutional means was developed to deter *unlawful* police conduct. It has no reasonable application where police officers in good faith submit the question of whether they have probable cause for judicial evaluation." *People v. Kirk,* 43 Cal.App.3d 921, 925, 117 Cal.Rptr. 345, 347 (1974). Accord, *State v. Gerardo,* 250 A.2d 130, 133 (N.J. 1969); *cf. State v. Smith,* 558 P.2d 265, 268 (Wash. App. 1976). Suppression of evidence is self-defeating when the police do exactly what the Constitution commands: secure a warrant from a neutral, detached magistrate. Indeed, the oft-invoked "preference for warrants," see *United States v. Ventresca,* 380 U.S. 102, 109-110 (1965), may well arise from the perceived absurdity of excluding evidence not because a constable has blundered but because a magistrate has miscalculated. *State v. Lien,* 265 N.W.2d 833, 840 n.1 (Minn. 1978).

Petitioner challenges the existing judicial practice of suppressing evidence seized under a warrant issued without probable cause. This Court has never explained why exclusion is a relevant, much less necessary, sanction for erroneous determinations by state magistrates. To this day, *Aguilar v. Texas,* 378 U.S. 108 (1964), is a rule without a reason. This Court should not perpetuate a judicially created rule which, as will appear, began life as an accident,

matured into an unexplained assumption, and survives as an obstacle to the essential objective of the Fourth Amendment—to encourage resort to warrants—and to the central purpose of criminal trials—to determine the truth. Instead, the rule followed should be:

> A search warrant issued by a judicial officer may not be attacked on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable.

This case presents an affidavit found sufficient by a magistrate who was both an attorney and a judicial officer, subsequently found adequate by two trial court judges, only to be held unconstitutional by an appellate court applying standards set down in this Court. There has been no claim that the affidavit contains any misrepresentation. It cannot be said that the magistrate who relied upon the affidavit acted unreasonably or that the officer who relied upon the warrant did not act in good faith. This case illustrates the need for a refinement of the Exclusionary Rule.

ARGUMENT

I

THE EXCLUSIONARY RULE DOES NOT REQUIRE SUPPRESSION OF EVIDENCE SEIZED UNDER A JUDICIAL WARRANT BASED UPON AN AFFIDAVIT WHICH ARGUABLY ESTABLISHES PROBABLE CAUSE.

Origins of Present Rule

This Court first reversed a state court judgment on the basis of a deficient search warrant affidavit in *Aguilar v.*

Texas, 378 U.S. 108 (1964). *Aguilar* has been widely accepted as authority for imposition of the exclusionary rule. See, *e.g.*, *United States v. Karathanos*, 531 F.2d 26, 33, *cert. denied*, 428 U.S. 910 (1976). *In re Martinez*, 1 Cal. 3d 641, 651 n.8, 83 Cal.Rptr. 382, 389 n.8 (1970). In fact, *Aguilar* did not impose the exclusionary rule either expressly or impliedly. The Court uttered not a single word on that subject because it was informed at page five of the Brief for Respondent that a Texas statute, Article 727a, VACCP, enacted in 1925, provided:

> "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

This Court decided only that the affidavit failed Fourth Amendment standards. Evidence obtained pursuant to the warrant based upon that affidavit was excluded by state statute not constitutional compulsion. Application of the exclusionary rule was not before the Court, much less decided, in *Aguilar*.

Nevertheless, two years later the Court filed its brief *per curiam* order in *Riggan v. Virginia*, 384 U.S. 152 (1966), declaring:

> "The petition for a writ of certiorari is granted. The judgment is reversed. *Aguilar v. Texas*, 378 U.S. 108."[1]

---

[1]The Court had previously filed a similar summary reversal order in *Barnes v. Texas*, 380 U.S. 253 (1965). In light of the Texas statute, *Barnes* added nothing to *Aguilar*.

Aguilar was not authority for reversal, however, because Virginia, unlike Texas, admitted illegally seized evidence as a matter of state law. *Hall v. Commonwealth*, 121 S.E. 154 (Va. 1924), cited in appendix to *Elkins v. United States*, 364 U.S. 206, 232 (1960). This Court, like the state appellate court, simply assumed that *Aguilar* authorized suppression. *Riggan v. Commonwealth*, 144 S.E.2d 298, 301-302 (Va. 1965). In its pleading before this Court the Commonwealth did not suggest otherwise. Thus, without argument, without a hearing, without explanation and, apparently, without consideration, *Aguilar* was deemed authority for a rule it did not announce.

Five years later, in *Whitely v. Warden*, 401 U.S. 560 (1971), a divided Court again suppressed evidence seized by state officers under a warrant issued without probable cause. Again no explanation for exclusion was offered. This time, the single sentence ordering suppression was followed by a citation to *Mapp v. Ohio*, 367 U.S. 643 (1961), instead of a reference to *Aguilar*. Since *Mapp* was not a warrant case, it did not add to the Court's legal reasoning.[2] In fairness, it must be noted that the warden's nine-page brief did not suggest the inappropriateness of applying the exclusionary rule.

Whitely's reliance on *Mapp* was almost predictable since the *Mapp* plurality did declare, "We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." 367 U.S. at

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[2]Ironically, *Whitely's* author would have overruled *Mapp*. *Coolidge v. New Hampshire*, 403 U.S. 443, 490 (1971) (concurring opinion of Mr. Justice Harlan).

655. As applied to warrant cases, of course, the quoted language is *dictum*. That the *dictum* was followed in *Whitely* is ultimately traceable to the fact that "The discursive prevailing opinion in *Mapp v. Ohio* . . . does not clearly identify the primary basis for the rule. . . ." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Chi. L.Rev. 665, 670 (1970). The Court confronted the warrant cases before it clarified the fundamental purpose of the exclusionary rule: deterrence of police misconduct. Had the Court held that purpose firmly in mind when it decided *Whitely*, logical consistency would have required admission of the seized evidence.

Modern Pragmatic Approach

Confronted by such problems as the "silver platter" doctrine and retroactivity, the Court began to clarify the purpose of the exclusionary rule. First repudiated was the notion that exclusion was a remedy for an invasion of the accused's personal right of privacy. *Elkins v. United States*, 364 U.S. 206, 217 (1960); *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

Next dispatched was the "imperative of judicial integrity doctrine." A rhetorical success but an analytical failure, this doctrine has never been the sole basis for suppression of evidence. Oaks, *supra*, 37 U.Chi. L.Rev. at 669. Devised by Justices Holmes and Brandeis as a nonconsitutional justification for imposing the exclusionary rule before accumulated experience suggested the inadequacy of existing alternatives, the imperative of judicial integrity referred to public respect for the courts, not judicial self-respect. *Olmstead v. United States*, 277 U.S. 438, 466, 469-470, 479,

483-484 (1927). The doctrine fails for two reasons: (1) the court which excludes evidence to condemn police misconduct appears to condone the acts of the criminal, Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan,* 43 Calif. L.Rev. 565, 582 (1955); (2) the disparity in particular cases between the magnitude of the police error and the gravity of the unpunished crime deeply offends the public sense of justice and proportionality. Kaplan, *The Limits of the Exclusionary Rule,* 26 Stan. L.Rev. 1027, 1036 (1974). See also Schrock and Welsh, *Up From Calandra: The Exclusionary Rule,* 59 Minn. L.Rev. 251, 265 (1974).

The imperative of judicial integrity doctrine was undermined in *United States v. Calandra,* 414 U.S. 338 (1974), overturned in *Michigan v. Tucker,* 417 U.S. 433 (1974), and consigned to oblivion in *United States v. Janis,* 428 U.S. 433 (1976). In *Michigan v. Tucker* the Court characterized the imperative as "really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent basis for excluding challenged evidence." 417 U.S. at 450 n.25.

Janis completely submerged the imperative within the deterrence rationale:

> "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. See *United States v. Calandra,* 414 U.S. at

> 347, 354. The focus therefore must be on the question whether the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."

428 U.S. at 458 n.35. Accord, *Stone v. Powell,* 429 U.S. 465, 485 (1976).

Having identified deterrence as its compelling justification, it was inevitable that this Court would refine the exclusionary rule. That process, begun in *Calandra,* proceeds apace. *Calandra* signalled a discriminating approach to suppression that is the antithesis to *Mapp*:

> "As with any remedial device, the application of the exclusionary rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

414 U.S. at 348.

The trend of recent cases is summarized in *Janis*:

> "'[W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served.' *Desist v. United States,* 394 U.S. 244, 254 n.24 (1969)."

428 U.S. at 454 n.28.

Thus, the Court refused to entertain Fourth Amendment claims on habeas corpus, reasoning that no significant additional deterrence would result. *Stone v. Powell,* 429 U.S. 465 (1976). *Michigan v. DeFillippo,* 443 U.S. 31 (1979), rejected suppression as an appropriate sanction for a search and seizure made incident to arrest under a statute

subsequently declared unconstitutional. In *United States v. Peltier*, 422 U.S. 531 (1975), the Court refused to exclude evidence discovered by searches which arguably complied with preexisting law.

> "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Id. at 542.

Peltier reiterated the reasonable, good faith standard for exclusion set down a year earlier in *Michigan v. Tucker*, 417 U.S. at 447:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The inescapable logic of *Calandra*, *Tucker*, *Stone*, *Janis*, *Peltier*, and *DeFillippo* is that exclusion is an irrelevant sanction when evidence is acquired pursuant to a warrant issued by a judicial magistrate on the basis of an affidavit free of material misrepresentation. See *Stone v. Powell*,

429 U.S. at 498 (concurring opinion of Burger, C. J.); *Brown v. Illinois*, 422 U.S. 590, 609-612 (concurring opinion of Powell and Rehnquist, J. J.); *cf. Stone v. Powell*, 429 U.S. at 537 (dissenting opinion of White, J.). Why a police officer may rely upon the constitutional validity of a legislative enactment, *Michigan v. DeFillippo*, *supra*, but not upon a magistrate's determination of constitutional sufficiency remains a puzzle. That both questions are ultimately for judicial determination only heightens the mystery.

CONCLUSION

For the stated reasons, petitioner respectfully urges that the petition for writ of certiorari be granted.

Dated: November 24, 1980.

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(Appendices follow)

Appendix A

In the Court of Appeal of the State of California

First Appellate District, Division Three

1 Civil No. 49873
(Sup. Ct. No. MCR3513)

Dorothy Hall,
Petitioner,

vs.

Superior Court of the State of California, County of Monterey,
Respondent,

People of the State of California,
Real Party in Interest.

[Filed Aug. 22, 1980]

OPINION

Petitioner, the defendant in a prosecution for possession of a controlled substance for the purpose of sale (Health Saf. Code, § 11351), challenges trial court denial of her motion to suppress evidence. We have concluded that she is entitled to the relief requested. Her motion was improperly denied because the affidavit supporting the search warrant which led to discovery of contraband was defective.

Petitioner was arrested on March 6, 1980 in the City of Seaside, after Detective Zimmerman executed a search warrant issued the previous day. Concerning the source of his

information, the affiant, Detective Zimmerman, stated only: "I was contacted by a confidential informant, known to me from numerous past transactions to be a consistent supplier of reliable information to myself as well as other police officers." This is insufficient for the following reasons.

The *Aguilar-Spinelli* test sets forth two requirements for the sufficiency of a warrant based on an informant's hearsay statements: "The *Aguilar* [*Aguilar v. Texas* (1964) 378 U.S. 108 . . .]—*Spinelli* [*Spinelli v. United States* (1969) 393 U.S. 410 . . .] test is stated by *People v. Hamilton* (1969) 71 Cal. 2d 176, 179-180 . . . , as follows: '[F]or an affidavit based on an informant's hearsay statement to be legally sufficient to support the issuance of a search warrant, two requirements must be met: (1) the affidavit must allege the informant's statement in language that is factual rather than conclusionary and must establish that the informant spoke with personal knowledge of the matters contained in such statement; and (2) the affidavit must contain some underlying factual information from which the magistrate issuing the warrant can reasonably conclude that the informant was credible or his information reliable.'" (*People v. Schmidt* (1980) 102 Cal.App.3d 172 177.)

The problem with the affidavit in this case is that it is conclusionary and does not disclose the "underlying factual information" needed to establish the reliability of the informant. The language of the affidavit is no more than a bald recital of reliability. Nowhere are facts disclosed upon which a magistrate could make an independent determination that the informant had provided reliable information in the past.

In *Spinelli v. United States* (1969) 393 U.S. 410, 414, the affiant had declared he "'[had] been informed by a confidential reliable informant . . . .'" The United States Supreme Court held that this was not sufficient. Here, the only additional information provided by the affiant was that the informant was known to him from "numerous past transactions" and that he was a "consistent" supplier of reliable information. Nowhere are facts concerning the nature of the past information or the results flowing therefrom. Without such facts the magistrate could not independently assess the informant's reliability. He could only rely upon the conclusions of the affiant.

The Attorney General argues that added reliability is supplied by a later portion of the affidavit which mentions that the informant stated that he had purchased narcotics from petitioner on March 3, 1980. He asserts that these statements were made against the penal interest of the informant and that reliability inheres in that circumstance. (See *United States v. Harris* (1971) 403 U.S. 573; *Caligari v. Superior Court* (1979) 98 Cal.App.3d 725, 733-734.) We reject that argument. There is nothing in the affidavit to support the Attorney General's assertion that the prior purchase was an illegal act for which the informant could be prosecuted or to negate the possibility that the purchase of March 3, 1980 was a controlled police "buy."

We hold that the affidavit in support of the search warrant was insufficient and that the motion to suppress was improperly denied. We have reached this conclusion after a full briefing by the parties. Issuance of an alternative writ would only cause undue delay in the proceedings. We therefore issue a peremptory writ in the first instance.

(Code Civ. Proc., § 1088; *San Diego Wholesale Credit Men's Assn. v. Superior Court* (1973) 35 Cal.App.3d 458; *Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 697.)

Let a peremptory writ of mandate issue directing the Monterey County Superior Court to vacate its order of May 15, 1980 denying petitioner's motion to suppress and to enter an order suppressing all evidence seized as a result of execution of the invalid search warrant.

White, P. J.

We concur:

Scott, J.

Feinberg, J.

Appendix B

Order Denying Hearing
After Judgment by the Court of Appeal

1st District, Division 3, Civil No. 49873

In the Supreme Court
of the
State of California

In Bank

[Filed Oct. 15, 1980]

Hall, Petitioner,

v.

The Superior Court of the County of Alameda, Respondent;
People, Real Party in Interest.

Petition of real party interest for hearing DENIED.

/s/ Bird
Chief Justice